IN THE

Supreme Court of the United States

October Term, 1959

No. 537 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND MOTION FOR LEAVE TO USE PREVIOUS RECORD

JOHN J. ABT,
320 Broadway,
New York 7, N. Y.,

JOSEPH FORER,
711 14th St. N. W.,
Washington, D. C.

Attorneys for Petitioner.

INDEX

PAGE

APPENDICES *

Cases Cited

* Page references are to the separate volume containing the appendices.

Statutes and Legislative Material Cited

Miscellaneous Citations

IN THE

Supreme Court of the United States

October Term, 1959

No.

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner.

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

MOTION FOR LEAVE TO USE PREVIOUS RECORD

Petitioner moves for leave to use as part of the record on petition for certiorari, and on certiorari if granted, the printed record heretofore filed with the Court in No. 48, October Term, 1955, *Communist Party of the United States of America* v. *Subversive Activities Control Board.*

That case involved the same litigation to which the appended petition for certiorari is addressed. The certified record prepared below for the present petition supplements the previous printed record, commencing with proceedings subsequent to this Court's remand in its decision in No. 48, October Term, 1955, 315 U. S. 115.

Respectfully submitted,

JOHN J. ABT,
JOSEPH FORER,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1959

No.

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Communist Party of the United States of America petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 2845; Appendix B),[1] which affirmed (Judge Bazelon dissenting) an order of the Subversive Activities Control Board (R. 138) that the petitioner register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 786.[2]

---

[1] Pages 1-2170 of the record are in the printed record filed with the Court when this case was here before (No. 48, Oct. Term, 1955), Pages 2171-2853, containing proceedings after the Court's' remand, are in a certified supplemental record. The appendices to this petition are printed in a separate volume.

[2] The Subversive Activities Control Act, as amended, is Title 1 of the Internal Security Act of 1950, 64 Stat. 987, and is hereafter referred to as the Act.

Opinions Below

The initial opinion and dissenting opinion below (R. 2078) are reported in 223 F. 2d 531.

The second opinion below (R. 2758), followed proceedings before the Board after a remand by this Court, and is reported in 254 F. 2d 314, Judge Bazelon again dissenting. This decision was modified by an unreported memorandum dated April 11, 1958 (R. 2821).

The third opinion below (R. 2835) followed additional proceedings before the Board in accordance with the second decision below, and is not yet reported. Judge Bazelon dissented in part.

All the opinions appear in Appendix A hereto.

Jurisdiction

The judgment below is dated and was entered on July 30, 1959 (R. 2845). A timely petition for rehearing (R. 2846) was denied on August 27, 1959 (R. 2849). Jurisdiction of this Court is conferred by section 14(a) of the Act, 64 Stat. 1001, 50 U. S. C. 793, and 28 U. S. C. 1254.

Questions Presented

1. Whether the provisions of the Subversive Activities Control Act of 1950, as amended, and as supplemented by section 5 of the Communist Control Act of 1954, relating to Communist-action organizations and their members, are unconstitutional on their face or as applied in this case.

2. Whether the order of the Board and the decision below rest on an erroneous construction of the Act's definitions of a Communist-action organization and the world Communist movement and on an erroneous construction and application of the Act's standards of proof.

3. Whether the order of the Board is unsupported by the preponderance of the evidence.

4. Whether all testimony of the Attorney General's witness Budenz should have been stricken because prior statements relating to his testimony, demanded by petitioner while he was on the stand, were not produced until he was no longer available for cross-examination.

5. Whether the Board and the court below erred in refusing to require production to petitioner of prior statements made by witnesses of the Attorney General on subjects concerning which they testified.

6. Whether the court below, having stricken one of the key findings on which the Board based its order, erred in refusing to remand the proceeding for administrative redetermination.

Statutes Involved

The pertinent provisions of the Subversive Activities Control Act, as amended, the Immigration and Nationality Act, the Communist Control Act of 1954, and the Social Security Act, are set forth in Appendix C.

Statement of the Case

This case is before the Court for the second time. See *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

On April 20, 1953, following an administrative hearing, the Board issued its order that petitioner register as a Communist-action organization and a Report containing its findings (R. 1-138). On review, the court below struck two key findings of the Board as not supported by the evidence. These were (1) that petitioner engaged in secret practices for the purpose of promoting its objectives and concealing foreign control and (2) that petitioner reported to the Soviet government. Nevertheless, the court proceeded to hold the Act constitutional and to affirm the findings and order of the Board in all other respects. Judge Bazelon dissented on the ground that the Act violates the

Fifth Amendment privilege against self incrimination. *Communist Party* v. *Subversive Activities Control Board,* 223 F. 2d 531 (R. 2078).

This Court reversed, without reaching the other questions presented, because of the denial below of petitioner's motion for leave to adduce evidence that three of the Attorney General's witnesse were perjurers. *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115.

Upon the remand, the Attorney General did not controvert petitioner's allegations of perjury by the three witnesses, and the Board therefore expunged their testimony (R. 2174-75). On December 18, 1956, the Board issued a Modified Report (Mod. Rep.; R. 2403) and a recommendation (R. 2610) that the court below affirm the registration order.

On January 9, 1958, the court below ordered the case again remanded to the Board, and on April 11, 1958, it enlarged the scope of the remand. See *Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314 (R. 2578), as modified by court's memorandum at R. 2821. This decision ruled that the principles of the "Jencks" statute (18 U. S. C. 3500) were applicable to administrative proceedings. Accordingly, it held that the Board had erred in refusing to require the production of certain documents involving the Attorney General's witness Markward and statements made by the witness Budenz to the FBI on two matters ("the Starobin letter" and "the Weiner conversation") concerning which he had testified. The court, however, refused to require the production of Budenz' FBI statements on other matters concerning which he had testified. It also refused production of a memorandum which the Attorney General's witness Gitlow had furnished the FBI concerning the subject of his testimony. Judge Bazelon dissented from the latter two rulings.

In the ensuing administrative proceeding, the Board furnished petitioner with excerpts from Budenz' FBI state-

ments which it considered relevant to the Starobin and Weiner matters. The recall of Budenz for cross-examination with the aid of these statements proved impossible because of his ill health. Petitioner's motion to strike all of his testimony because of his unavailability was denied, but the Board struck the testimony on the Starobin and Weiner matters (R. 2387-91). Petitioner also moved for production of statements made to the FBI by all the Attorney General's witnesses on matters relating to their testimony. The motion was denied (R. 2338, 2344-46).

On February 9, 1959, the Board issued its Modified Report on Second Remand (2d Mod. Rep.; R. 2375), in which it readopted the first Modified Report with certain amendments [3] and again recommended affirmance of the registration order (R. 2399). The Second Modified Report retained a finding of the First Modified Report regarding the purpose of petitioner's secret practices (R. 2398), notwithstanding that the finding had been stricken by the court below in its initial review.

The court below affirmed the order of the Board (R. 2835) although it adhered to the view that the finding on secret practices was unsupported by the evidence (R. 2837). Judge Bazelon dissented on the grounds (1) that the invalidity of the Board's finding on secret practices required a remand of the proceedings for administrative redetermination and (2) that all of Budenz' testimony should have been stricken (R. 2843).

The Act

The Act was passed on September 23, 1950, over the President's veto, shortly after the outbreak of the Korean war. It provides for administrative proceedings before the Board, on petitions of the Attorney General, to determine

[3] These are listed in an appendix to the Second Modified Report (R. 2400) and indicated in an appended text of the first Modified Report (R. 2379, 2403).

whether accused organizations shall be required to register as "Communist-action" or "Communist-front" organizations (sec. 13) or shall be declared "Communist-infiltrated" organizations (sec. 13A, added by sec. 7 of the Communist Control Act of 1954). The latter, although not required to register, are deprived of the benefits of the National Labor Relations Act (sec. 13A(g)).

A Communist-action organization is defined as one "which (i) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title" (sec. 3(3)). Section 2 finds that there is a world Communist movement, controlled by the Communist dictatorship of an (unnamed) foreign country, which seeks, by treacherous and terroristic methods and through the medium of a world-wide Communist organization, to overthrow capitalist governments and establish in their place totalitarian dictatorships subservient to the foreign dictatorship. Section 2(15) recites that, "The Communist movement in the United States is an organization" which pursues the stated objectives and presents a clear and present danger to the security of the United States. Section 13(e) of the Act establishes eight criteria for the Board to consider in determining whether an organization is a Communist-action organization.[4]

[4] A Communist-front organization is defined, in substance, as one which is controlled by a Communist-action organization and is primarily operated to aid a Communist-action organization, a Communist foreign government, or the world Communist movement (sec. 3(4)). A Communist-infiltrated organization is defined, in substance, as one which is controlled by individuals who are, or have been within three years, engaged in giving support to a Communist-action organization, a Communist foreign government or the world Communist movement, and is serving, or within three years has served, as a means for giving support to any such organization, government, or movement, or for the impairment of the military or industrial strength of the United States (sec. 3(4A)).

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members, give a detailed accounting of all moneys received and expended, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection. (Sec. 7.)

When a registration order becomes final, as it does on exhaustion of judicial review (sec. 14(b)), the officers of the organization have an individual duty to register the organization and to list its members (sec. 7(h)). Members not so listed are under a duty to register themselves after an administrative determination of their membership (secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years and fine up to $10,000, for each day of default. Each falsity in a registration statement is punishable by a similar penalty. (Sec. 15.)

The listing or self-listing of members of petitioner in compliance with a registration order is affected by section 5 of the Communist Control Act, 68 Stat. 777, 50 U. S. C. 844, which enumerates thirteen criteria for determining "membership" in the Communist Party. These are extremely vague and depend on facts which cannot be ascertained by petitioner, its officers, or individuals seeking to determine if they are liable to registration as "members." (See *infra*, pp. 46-47.)

Any person whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under the broad sedition provisions of section 4(a) of the Act [5] as well as under the Smith Act.

---

[5] Section 4(a) makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control.

In addition, the entry of a final registration order automatically makes operative crippling sanctions against the organization and its members. These sanctions apply *whether or not* the organization registers.

The sanctions are the following:

(1) The organization must label publications and literature which it distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which, by definition, is a participant in a seditious conspiracy. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements appl, without regard to the nature and content of the publications and broadcasts. (Sec. 10.)

(2) Members of the organization may not hold nonelective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (sec. 5). A "defense facility" is any establishment listed by the Secretary of Defense on his *ex parte* determination that the security of the United States requires such listing (secs. 3(7), 5(b)). Accordingly, what employment is open to members of the organization rests in the unreviewable discretion of the Secretary of Defense.

(3) Government employees and employees of "defense facilities" are prohibited from contributing funds or services to the organization (sec. 5(a)(2)), and even from subscribing to its publications (sec. 3(6)). Accordingly, the *ex parte* determination of the Secretary of Defense limits the sources from which the organization can obtain funds or services or find readers of its material.

(4) Members of the organization may not hold or apply for passports (sec. 6).

(5) Alien members of the organization are excluded from admission into the United States; if already in the country, they must be deported. An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition. Naturalized citizens who join or affiliate with the organization within five years after naturalization are subject to revocation of citizenship.[6]

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions (sec. 11).

(7) Service in the employ of the organization after the order becomes final is not considered employment for social security purposes (42 U. S. C. 410(a)(17)).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and $10,000 fine (sec. 15).

The sanctions on members apply regardless of their personal innocence and lack of knowledge of alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.

The Evidence

Under section 14(a) of the Act, the Board's findings are required to be supported by "the preponderance of the evidence."

In the administrative proceeding the Attorney General called twenty-two witnesses (R. 134). As already stated,

---

[6] Originally contained in secs. 22 and 25 of the Act, these sanctions have been carried forward by secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1182, 1251, 1424, 1451.

the testimony of three of these (Crouch, Matusow and Johnson) was stricken following the first remand of the Board. Two of the other witnesses merely translated or identified documents. Another, a university professor, testified that petitioner and the Soviet Union held similar views on a number of international questions. (R. 135-36.)

The remaining sixteen witnesses had once held membership in the Communist Party. Twelve had left or been expelled from the Party prior to the date of the Act, six of them for periods ranging from five to twenty years before the Act. (R. 134-35.) None of the twelve testified as to the character or activities of petitioner subsequent to the termination of his membership.

The testimony of the four witnesses who had remained members after the date of the Act was meagre and related almost exclusively to the period before that date. These witnesses had been rank and file members or minor officers of local units (R. 134-35). Two of them had become inactive prior to the date of the Act (R. 1034-35; Tr. 12360). The four produced little evidence on which the Board relied.

The original Report of the Board (R. 1) credited all testimony introduced by the Attorney General and made no adverse comment on the credibility of any of his witnesses. The Second Modified Report shows the following changes in this situation: (1) The testimony of Crouch, Johnson and Matusow was expunged (R. 2175); (2) The most important testimony of Budenz (on the Starobin letter and Weiner conversation) was stricken because of his unavailability for cross-examination (R. 2391). (3) The Board, finding that the credibility of four witnesses of the Attorney General was dubious, eliminated original findings based on the only material testimony of Scarletto, Markward and Cummings, and the most significant testimony of Honig (R. 2528, ftn., 2384, 2573 ftn., 2497 ftn.).

The Modified Report acknowledges that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2409, ftn. 2). The great bulk of this documentary evidence consisted of Communist writings which long antedated the Act (R. 2413). These included the *Communist Manifesto* of 1848, writings in the 1920's or earlier of Lenin and Stalin, and resolutions and reports of the Communist International (dissolved in 1943, R. 2474), of which the most recent is dated 1935.

The case of the petitioner was presented through three witnesses. Two (Elizabeth Gurley Flynn and John Gates) had for many years been members of the petitioner's national committee. The third, Dr. Herbert Aptheker, a historian, author, and member of the Communist Party, testified as an expert on Communist doctrine. (R. 136.) The testimony of these witnesses and the documentary evidence introduced through them portrayed petitioner's purposes, policies and activities from the time of its reconstitution as a political party in 1945. This evidence shows petitioner as a self-governing, independent American political party which is an adherent of Communism and seeks by peaceful means to persuade the American people that they should adopt a socialist system. (R. 2128-31, 1199-1241, 1257-97.) The Board either rejected or ignored all of petitioner's oral and documentary evidence, although much of it was uncontradicted.

It is undisputed that petitioner, soon after its formation in 1919, joined the Communist International, a world-wide organization of Communist Parties. In 1940, petitioner disaffiliated from the Communist International in order to avoid registration under the then newly-enacted Voorhis Act. In 1943, the Communist International dissolved. (R. 2137-42.) As the court below acknowledged (R. 2142), petitioner has had no foreign affiliation since 1940.

There is no evidence that at any time after the 1940 disaffiliation petitioner received any directives or orders from abroad, and the Board found none. In fact, the record discloses only a few insignificant and innocuous contacts and communications of any kind between petitioner and the Soviet Union or its citizens since 1940—as, for example, that in December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (see *infra*, pp. 50-51).

The Board's findings on the eight criteria of a Communist-action organization, specified in section 13(e) of the Act, were as follows:

"Financial aid" (sec. 13(e)(3); *"Instruction and Training"* (sec. 13(e)(4)). The Board's own findings show that these criteria are not satisfied by the evidence. The Modified Report found: "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2568).[7] It also found: "There is no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 2573).[8]

"Reporting" (sec. 13(e)(5)); *"Discipline"* (sec. 13(e)(6)). The Board's ultimate findings on these criteria are contradicted by its own evidentiary findings.

The Board found that petitioner "upon occasion reports to the Soviet Union and its representatives" (R. 2583). But

---

[7] The only evidence of post-1940 financial aid cited by the Modified Report rests on Budenz' testimony that the Daily Worker received dispatches from a Moscow news service up to 1944 at a nominal cost (R. 2564).

[8] The latest instance of foreign instruction and training cited by the Modified Report occurred in 1936 (R. 2570).

the last instance of reporting cited by the Modified Report occurred in 1935 (R. 2575).[9]

The Board found that petitioner's "principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives" (R. 2519). But the Board cites no instance of discipline imposed at the behest of any foreign source after 1934. The claimed evidence of foreign discipline after 1934 consists of the following irrelevancies: (a) That petitioner, like other Communist Parties, believes that Party members should be held to strict adherence to Party decisions, and (b) instances in which petitioner, of its own accord and without any evidence of Soviet direction, disciplined some of its members. (R. 2510-19.)

"Secret Practices" (sec. 13(e)(7)). The subsection makes these practices relevant only if they are engaged in for the purpose of concealing foreign control or to promote the organization's objectives. The Modified Report found that petitioner "engages in extensive secret practices within the meaning of the Act, for the primary purpose of

---

[9] The Modified Report also contains an undated reference to reporting through Soviet agents in the United States (R. 2577). In the cross-referenced subsection on "Foreign Representatives in the United States," the only person found to have been a foreign representative after 1940 was Eisler, who is found to have been acting as such in 1945 (R. 105). This finding, based on discredited testimony of Budenz (R. 1187-91), obviously cannot support a finding of reporting after 1945. Moreover, it does not support a finding of reporting up to 1945 because the evidence and findings fail to show what, if anything, Eisler did as a representative to petitioner. The Modified Report's section on "reporting" also refers to a congratulatory telegram sent by petitioner to Stalin on his 70th birthday. It is not clear whether the Board found this to be a "report." In any event, it is clear from the text of the telegram, as well as the testimony cited by the Board on its "significance," that it was not a "report" under any intelligible meaning of the term. (R. 2580-81.)

promoting its objectives and thereby to advance those of the world Communist movement" (R. 2598). The court below held that this finding was not supported by the evidence (R. 2837).[10]

"Non-deviation" (sec. 13(e)(2)). The Board found that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 2562). This finding was based primarily on testimony that petitioner and the Soviet Union, as shown by their respective public statements, held similar views on each of 44 different questions relating to international affairs, such as criticizing the League of Nations in 1919, favoring a second-front in World War II, characterizing the Chiang Kai Shek regime as a corrupt dictatorship, and advocating an armistice in the Korean War (R. 2555).

In reaching this finding, the Board held that it was irrelevant whether petitioner had formulated its view on a given subject before the Soviet Union (R. 2555-56). It precluded petitioner from introducing evidence that the similarities of its views and those of the Soviet Union were attributable to the independent application by each of the premises and approach supplied by Marxist principles (R. 842-44, 836), and then held that the weight of the evidence was to the contrary (R. 2562). It excluded proof of the truth, reasonableness and general acceptance of the views, and that the views were calculated to promote the best interests of the United States (R. 2566, 836-37, 839, 840, 844-45, 861, 862-64).

"Directives and Policies" (sec. 13(e)(1)). The Modified Report found: "* * * [petitioner] is still pursuing policies enunciated by the Soviet Union through the Communist International. [Petitioner's] policies, programs,

[10] The Board abandoned the finding of its original Report that an additional purpose of the "secret practices" was to conceal foreign control (cf. R. 117 with R. 2585 ftn. 1).

and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further the world Communist movement" (R. 2554).

As these findings indicate, the record contains no evidence of any foreign directive to petitioner at least since petitioner's disaffiliation from the Communist International in 1940, and the Modified Report found none.[11] The findings are based on the following analysis: (a) Marxist theory emphasizes the importance of winning the support of trade unions, youth, and national minorities for achieving Socialism; (b) petitioner adheres to this theory and "likewise attaches extreme importance to work among" these groups. (R. 2536, 2536-54.)

"*Allegiance*" (sec. 13(e)(8)). The Modified Report found that petitioner's "leaders and a substantial portion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 2607). This finding is based primarily on the Board's view (R. 2599-2607) of Communist theory as developed in the works which were examined in *Schneiderman* v. *United States*, 320 U. S. 118, and from which this Court concluded that belief in Communist doctrine was not incompatible with attachment to the principles of the Constitution and being well disposed to the good order and happiness of the United States.

The evidence and reasoning on which the court below affirmed the Board's order were summarized by the court, as follows:

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-

[11] The quoted findings supersede a finding under sec. 13(e)(1) in the Board's Original Report, that petitioner's "policies are formulated and carried out and its activities are performed pursuant to directives of, and to effectuate the policies of, the Soviet Union, which directs and controls the world Communist movement" (R. 79).

> Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United State of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line;[12] and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes." (R. 2842.)

The summary of the Modified Report is to the same effect (R. 2608-09).

REASONS FOR ALLOWING THE WRIT

In granting the former petition for certiorari in this case, the Court accepted for review all the questions then presented by petitioner (No. 718, Oct. Term, 1954). These included the questions now presented as 1, 2, 3 and 6. Questions 4 and 5 arise as a result of rulings made by the

---

[12] The reference is to the following events. In 1944, petitioner dissolved and constituted itself as the Communist Political Association. In 1945, petitioner reconstituted itself as the Communist Party. The reconstitution followed the appearance in a French Communist journal of an article by Jacques Duclos, a leading French Communist, which criticized the dissolution of the Party and the policies of Browder, then chairman of the Association. The evidence is uncontradicted that the Duclos article was not written to bring petitioner "to task," but was directed to French Communists in answer to questions raised by many of them regarding developments in America, and that petitioner's reconstitution, though undoubtedly influenced by Duclos' analysis, was the product of its own independent decision (A. G. Ex. 208, p. 656; R. 1280, 1292-96).

court below after this Court's remand.[13] In remanding the case because of the denial below of petitioner's motion for leave to adduce additional evidence, the Court stated that "we must avoid any intimation with respect to the other issues raised by the petitioner." *Communist Party* v. *Subversive Activities Control Board, supra,* at 122-23.

It is clear, therefore, that this case presents issues which have not been, but should be, decided by the Court. However, in view of the time which has elapsed, the changes in the composition of the Court, and the presence of two new questions, we believe it appropriate to state in full the reasons for granting the writ.

I. The decision below, if allowed to stand, will have immediate and far-reaching consequences of great public importance.

A. If the decision below is allowed to stand, the Communist Party will be outlawed and its members subjected to intolerable civil sanctions and criminal prosecutions.

1. Petitioner's members will be denied private and public employment, deprived of the right to travel abroad, subjected to loss of naturalized citizenship, and, if aliens, deported. These sanctions will be imposed whether or not petitioner registers and regardless of the member's personal innocence and lack of knowledge of any illicit activities by petitioner (see *supra,* pp. 10-11).

2. Petitioner's officers will be confronted with this alternative: If they register, they incriminate themselves by signing the registration statement, and they also become informers on the members, whom they must list. If they do not register, they will be prosecuted for failing to do so.

---

[13] Questions 8, 9 and 10 of the earlier petition are not now presented. The other questions of the earlier petition are repeated or subsumed in the present questions.

3. If petitioner registers, each member and contributor will be publicly listed as belonging to or supporting a group which has been officially branded as a seditious foreign agent. The members and contributors will thus be subjected to public opprobrium and ensuing social and economic reprisals. They will also be identified as candidates for prosecution under the extravagantly vague provisions of section 4(a) of the Act, as well as under the Smith Act and other criminal laws.

4. If the officers do not register the organization, the individual members are faced with this alternative: If they register, they expose themselves to onerous penalties and public odium and invite criminal prosecution. If they do not register, they become liable to heavy criminal penalties.

5. Petitioner will suffer catastrophic consequences whether it registers or not. For the reasons already surveyed, its members and contributors will be under compulsion to withdraw their support. The sources from which it can lawfully obtain contributions and subscriptions to its publications will be dried up by ex parte determinations of the Secretary of Defense. It will be officially branded as a seditious foreign agent, and will have to label its publications and broadcasts accordingly (*supra*, p. 10). It will thus be denied an audience for its views. It will be quarantined, since any other organization which associates with it or supports its views will risk condemnation as a front or infiltrated organization under the Act's evidentiary standards (secs. 13(f) and 13A(e)). And individuals can have contracts or dealings with petitioner or its members only at the risk that under the sweeping criteria of section 5 of the Communist Control Act they will thereby become "members" of petitioner and incur the drastic consequences of that status.

The impact of the Act is such, therefore, that if petitioner registers, it will destroy itself and jeopardize the

livelihood and liberty of its members. If a member registers, he destroys himself. On the other hand, if there is no registration, petitioner, its officers and members will be subject to severe criminal penalties which cumulate for each day of non-registration. The choice, in short, is between suicide by registration or governmental execution for non-registration.

This will be the first time in our history that the Communist Party or any other political party has been outlawed by federal legislation. Yet Marxist groups and parties have been active in this country as lawful political organizations since the middle of the last century,[14] and the Communist Party has been a legal political party since its inception in 1919.

It is undeniable that the Communist Party has frequently played a seminal role in our social and economic life. Many reforms advanced by it have been adopted when the American people were convinced, with the aid of Communist agitation, that these were in their best interest. To name only a few: social security, minimum wage legislation, the organization of labor unions on industrial lines, and measures against racial discrimination.

No other Western democracy outlaws the Communist Party.[15] Only the United States asserts that such a measure

---

[14] American Marxists helped in the formation of the Republican Party, backed Lincoln's candidacy in 1860, made significant contributions to the cause of the federal government in the Civil War, helped form the first national federation of American trade unions, and played a leading role in organizing the American Federation of Labor. See R. 1262-65, 1270-71; Gompers, Seventy Years of Life and Labor (N. Y. 1925), v. 1, pp. 51-60. Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." Selected Essays (N. Y. 1926), p. 140.

[15] Legislation to outlaw the Communist party of Australia was held unconstitutional by the High Court. *Australian Communist Party* v. *The Commonwealth*, 83 C. L. R. I.

is necessary for its safety and compatible with a free society.

B. If the order of the Board becomes final, it will supply the foundation for governmental proscription of many other organizations and for the imposition of the Act's sanctions against their members.

The Board has already ordered twelve organizations to register as "Communist-fronts". All these cases are pending in the United States Court of Appeals for the District of Columbia Circuit and have been awaiting disposition of the present case. Another "front" case is pending before the Board. One case pending before the Board charges that an international labor union is an "infiltrated" organization. The alleged "front" organizations include two schools for social studies and groups promoting such causes as civil liberties, Soviet-American amity, the interests of the foreign born, economic security for the aged, and the defense of individuals charged under the Smith Act.[16]

The number of front and infiltrated organizations can be multiplied almost indefinitely in the light of the com-

---

[16] The organizations ordered to register as "fronts" are Jefferson School of Social Science, California Labor School, Civil Rights Congress, National Council of American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, United May Day Committee, Washington Pension Union, Labor Youth League, American Peace Crusade, Colorado Committee to Protect Civil Liberties, Connecticut Volunteers for Civil Rights, California Emergency Defense Committee. The "front" case pending before the Board is against the American Committee for the Protection of the Foreign Born. The "infiltrated" case before the Board is against the International Union of Mine, Mill and Smelter Workers.

prehensive criteria of sections 13(f) and 13A(e).[17] Moreover, if the present categories of "front" and "infiltrated" organizations turn out to be too restricted, new ones can be created. Having moved from "action" and "front" organizations to "infiltrated" organizations, the Act could next be extended to groups which are "contaminated" and, finally, "politically unreliable".

If the Constitution can be held to authorize the premises which underlie the proscription of petitioner, there remains little room for constitutional objections to the application of the Act to these other organizations. Moreover, the techniques and interpretations of the Act used against petitioner by the Board and the court below, if allowed to stand, can be applied so as to destroy virtually any group whose views are not governmentally approved.

C. If the order of the Board becomes final, the civil and criminal penalties which the Act imposes on individuals for membership in petitioner will be extended far beyond those who are its members by any conventional or rational standards. The all-embracing criteria of membership contained in section 5 of the Communist Control Act will

---

[17] An illustration of these criteria in operation is supplied by the following typical allegation made by the Attorney General in a petition to require an organization to register as a front: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests such as the Mundt-Nixon Bill, the Hobbs Bill, and the Internal Security Act of 1950." Paragraph III(4)(c) of Amended Petition in *Rogers* v. *American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board. In another case, the gravamen of the Board's findings in support of a registration order was that the organization "came into existence at Denver, Colorado, in the fall of 1954, that it was created by the Communist Party to raise defense and bail funds for the Colorado seven and to mobilize public opinion for them and against the Smith Act and prosecutions thereunder." Report of the Board, p. 17, in *Rogers* v. *Colorado Committee to Protect Civil Liberties*, Board Docket No. 120-57.

jeopardize the liberty of countless non-Communists. The Court should not wait until the axe has fallen on some of these victims before determining whether it may be constitutionally wielded.

D. President Truman declared in his veto message (H.R. Doc. No. 708, 81st Cong., 2d Sess., pp. 6-7):

> "Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

For this reason the President stated that the registration provisions of the legislation "represent a clear and present danger to our institutions" (*id.*, p. 5). On this and related grounds, passage of the Act was opposed by numerous trade unions, religious and community organizations, more than twenty major newspapers, and many prominent lawyers and laymen.[18]

---

[18] Hearings before House Committee on Un-American Activities, H.R. 81st Cong., 2d Sess., on H.R. 3903 and 7595; Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H.R. 5852; Cong. Rec., 81st Cong., 2d Sess. pp. A6135, A6220-21, A6724-26, A7397, A7266, A7275-81. See R. 185. Organizations opposing the bills included: A.F. of L., C.I.O., Brotherhood of Railway Trainmen, National Farmers Union, Society of Friends, American, Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for Advancement of Colored People, Council for Social Action, Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council.

This proceeding immediately involves the rights of Communists. But events of recent years have once more proved that repression cannot be contained. What began as a drive against Communists inexorably led to the victimization of thousands of non-Communists, who were prosecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to leave or enter the country, and otherwise persecuted. A climate of fear was created and American prestige was lowered throughout the world. The climate has somewhat improved, but it will become worse than ever if the repressive measures of the Act come into operation.

II. This proceeding presents important constitutional questions which should be decided by the Court.

A. The First Amendment

1. As we have seen, a final registration order and its concomitant sanctions will exact a prohibitive price for membership in, support of, or association with petitioner. The Act thus invades the area of the First Amendment, which guarantees "freedom to engage in association for the advancement of beliefs and ideas." *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 460.

Statutes affecting speech, press and assembly must be narrowly drawn to meet a substantive evil which the legislature has power to control. A statute penalizing conduct or advocacy which lies outside the area protected by the First Amendment is nevertheless invalid if it is so broad as to include protected expression or assembly. *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Cantwell* v. *Connecticut*, 310 U. S. 296, 308; *Winters* v. *New York*, 333 U. S. 507. Cf. *Australian Communist Party* v. *Commonwealth*, 83 C. L. R. 1, 187-88, 225-27.

The Act violates this principle. Although its justification, stated in section 2, is the alleged misconduct of Com-

munist-action organizations, its controls are not limited to misconduct. Instead, the Act and the order suppress all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly. As the President said in a special message to Congress, the Act "proscribe[s] for certain groups such as the Communists, certain activities that are perfectly proper for everyone else" (H. R. Doc. No. 679, 81st Cong., 2d Sess., p. 6). Indeed, it is precisely peaceable advocacy and innocent association which the Act is designed to reach, since there is a plethora of other laws which punish seditious advocacy and provide for the registration of foreign agents.

In *American Communications Association* v. *Douds*, 339 U. S. 382, the Court sustained a statute only because it "did not restrain the activities of the Communist Party as a political organization" (at 404) or proscribe or severely burden Party membership. The Act does the very things condemned by *Douds*.

Like the Act as a whole, the individual sanctions apply indiscriminately to innocent and harmful conduct. For example, the restrictions on employment of members go far beyond any reasonable protection of the government service and defense establishments. They are not limited to sensitive positions, and they apply notwithstanding the member's personal innocence, absence of criminal propensities, and lack of guilty scienter. Cf. *Cole* v. *Young*, 351 U. S. 536. Similarly, the passport bar takes no account of personal innocence; instead of merely preventing foreign travel in pursuit of illegal enterprises, it applies regardless of the purpose of the travel. Cf. *Kent* v. *Dulles*, 357 U. S. 116.

In short, the function of the sanctions, even when considered individually and apart from their setting in the Act as a whole, is not to protect the national security. Such protection, if needed, could have been provided by narrowly-drawn legislation addressed to that purpose. The Act's

sanctions serve a different purpose, to make registration impossible, destroy petitioner, and deny its members their livelihood and liberties merely because of their membership.

2. The Act imposes prior restraints on protected speech, press and assembly. The Act and the order require petitioner to register as a criminal conspiracy as a condition to its lawful existence. They require the public listing of petitioner's members as participants in the conspiracy as a condition of their membership. They require petitioner to list its printing and duplicating facilities and proscribe subscriptions to its publications. Petitioner must also identify its publications and broadcasts with an invidious label whether or not it registers and regardless of the content of the expression. Petitioner's exercise of the rights of speech and press is licensed not because its words are seditious or create a clear and present danger, but solely because they emanate from petitioner. The members' exercise of their First Amendment rights is licensed solely because of their association with petitioner.

The decision below therefore conflicts with this Court's condemnation of prior restraints on First Amendment rights. *Thomas* v. *Collins*, 323 U. S. 516, 540, invalidated "the device of requiring previous registration as a condition for exercising" the rights of free speech and assembly. *Kingsley Corp.* v. *Regents*, 360 U. S. 684, set aside censorship not justified by content.

The registration and labelling requirements of the Act are not comparable to simple disclosure statutes like those requiring registration of lobbyists and foreign agents. Those statutes are non-discriminatory and non-invidious, whereas the Act's registration and labelling requirements are armband measures condemned in *American Communications Association* v. *Douds, supra*, at 402, and *N. A. A. C. P.* v. *Alabama, supra* at 462. Moreover, in construing those statutes, this Court has for constitutional reasons confined the controls to strictly limited areas. *United*

States v. *Harriss*, 347 U. S. 612; *Viereck* v. *United States*, 318 U. S. 236. The Act is not, and cannot be, so confined.

3. The Act imposes sanctions upon an organization and its members for lawful and peaceable political advocacy and views.

The standards of section 13(e) focus on views and policies and their expression. Thus the first standard refers to the source and the purpose of policies, the second to "nondeviation" of views and policies, the fourth to teaching, and the fifth to reporting. The views and policies need not be seditious or even false. Nor does the section require proof that the organization advocates violent or unconstitutional means for the effectuation of its policies.

Congress cannot control even the advocacy of violence unless it amounts to incitement in a clear and present danger situation. *Dennis* v. *United States*, 341 U. S. 494; *Yates* v. *United States*, 354 U. S. 298. Much less, therefore, can it punish an organization or its members upon evidence that the former advocates peaceable action as to which no clear and present danger can arise.

Passing to the Act as applied, it is clear from the Board's Modified Report and from the summary of the evidence in the last opinion below (*supra*, pp. 17-18), that the order rests on findings that petitioner and the Soviet Union are adherents of Communism and that petitioner has always agreed with the Soviet views. There was no finding that petitioner engages in or incites to violent or other unlawful action. In holding that the evidence established that petitioner is a Communist-action organization, the court below stated:

> "One who attaches himself by intellectual affiliation to a cause, assumes the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause" (R. 2843).

This case, therefore, presents the question whether the First Amendment permits outlawing an organization and

penalizing its members because of "intellectual affiliation" to Communism and agreement with Soviet views.

If the decision below is allowed to stand, there remain no effective limitations on Congress' control over political expression. If Congress can punish "non-deviation" from Soviet views, it can penalize "non-deviation" from other views. In fact, the Communist-front provisions of the Act already punish "non-deviation" from petitioner's views (sec. 13(f)).

B. The Privilege Against Self-Incrimination

If the order of the Board becomes final, the officers of petitioner will have the duty of registering it under the Act (sec. 7(h)).[19] In the event there is no registration by petitioner or its officers, or if the registration statement omits the names of any members, the members must register themselves (sec. 8). Failure to register as required is punishable by severe criminal penalties (sec. 15).

The legislative scheme therefore culminates in coercing confessions of membership in the Communist Party and participation in the criminal conspiracy described in section 2 and punished by section 4(a). This is a crass violation of the privilege against self-incrimination. *Blau* v. *United States*, 340 U. S. 159.

Congress attempted to save the Act by including a so-called immunity provision (sec. 4(f)).[20] This provision,

---

[19] Regulations of the Attorney General issued under the Act require the registration statement to be signed by the registrant's principal officers and all the members of its governing board. 28 C. F. R. 11.205.

[20] Sec. 4(f) provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under sections 7 or 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

however, does not exclude prosecution of an officer or member for offenses in which office-holding or membership is an ingredient of or clue to the offense and is proved by evidence other than the fact of registration. Hence the provision does not afford the accused "complete immunity from prosecution for any act concerning which he testifies," and is "not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions." *United States* v. *Bryan*, 339 U. S. 323, 336; *Counselman* v. *Hitchcock*, 142 U. S. 547.

The majority below reasoned that the privilege is not available because *United States* v. *White*, 322 U. S. 694, holds that the privilege does not protect an officer against production of incriminating records of his organization (R. 2093-94). This reasoning is unsound in three respects.

First, as Judge Bazelon pointed out (R. 2155), incrimination here arises not out of the contents of the records but from the fact that by signing the registration statement the signatories identify themselves as officers of the Communist Party and persons familiar with its affairs. These are the identical admissions which *Blau* v. *United States, supra*, held could not be compelled.

Second, the Act does not require production of the records, but the furnishing of information which may or may not be obtainable from the records. As held in *Curcio* v. *United States*, 354 U. S. 118,[21] *White* applies only to the production of the records themselves, and the privilege protects an officer from revealing their whereabouts, let alone from giving information as to their contents.

Third, the information which section 7(d) requires must be furnished by the officers even though it nowhere appears in the records of the organization.

The majority below also held that adjudication of the constitutional question is premature because petitioner's

---

[21] Decided after the initial decision below sustaining the constitutionality of the Act.

officers (1) may never assert the privilege, (2) may have done something to waive the privilege, or (3) may be granted immunity under 18 U. S. C. 3486 (R. 2096-2100).

(1) The familiar principle that the privilege is lost if not asserted is applicable where the person from whom incriminating information is demanded has an opportunity to claim the privilege before he is prosecuted for refusing to answer. If there is no opportunity to assert the privilege, it cannot be lost for non-assertion. The Act affords petitioner's officers no such opportunity. If they were to submit a claim of privilege to the Attorney General as a reason for non-compliance with the registration requirement, they would thereby identify themselves as officers of petitioner and make the same incriminating admission that registration entails. On the other hand, if they do not claim it, they will be indicted for failure to file the registration statement. It follows that this proceeding provides the only opportunity to secure to the officers the benefit of the privilege. Hence, the issue is not premature.

The effect of the holding below is that legislation which compels incriminating testimony can never be declared unconstitutional but merely unenforceable in individual cases against persons who assert the privilege. This is not the law. *Boyd* v. *United States*, 116 U. S. 616. That case involved a statute which, like the Act, afforded the accused no meaningful opportunity to assert the privilege. Accordingly, the Court (at 638) held the statute "unconstitutional and void" without reference to the doctrine that the privilege must be asserted to be availed of.[22]

---

[22] Similarly, state courts have invalidated state statutes compelling self-incrimination on their face. *In re DeWar*, 148 Atl. 489 (Vt.); *People* v. *Reardon*, 90 N. E. 829 (N. Y.); *State* v. *Simmons Hardware Co.*, 18 S. W. 1125 (Mo.); *People* v. *McCormick*, 228 P. 2d 349 (Calif.); *Maryland* v. *Perdew*, 19 U. S. L. Week 2357 (Md. C. C., Alleghany Cty.). The last two cases involved statutes requiring Communist Party members to register.

(2) The court below also held petitioner's constitutional attack premature because the privilege, if and when asserted by some of petitioner's present officers, might be found to have been waived by them (R. 2099). This is contrary to the rule that the privilege is not waived by admissions made extra-judicially, or in another proceeding, or even at a different stage of the same proceeding. *Re Neff*, 206 F. 2d 149; *United States* v. *Field*, 193 F. 2d 109; 8 Wigmore on Evidence (3rd ed.) sec. 2276(4). Moreover, there is no warrant for the court's assumption that the persons in question will be petitioner's officers at the time registration is required.

Furthermore, the issue of waiver cannot arise until a claim of privilege is made. Since the Act accords the officers no effective opportunity to make the claim, a refusal to adjudicate the issue in this proceeding because of the speculative possibility of waiver deprives petitioner's officers of the only chance they have to vindicate their privilege. As in the *Boyd* case, therefore, the privilege can be protected only by declaring the statute void on its face.

(3) The suggestion below that 18 U.S. C. 3486 might be invoked by the Attorney General to give immunity to petitioner's officers (R. 2099-2100) overlooks the fact that this statute is applicable only to testimony or the production of documents before Congressional committees, federal grand juries and federal courts, and has nothing to do with the filing of registration statements under the Act.

Obviously, the Act on its face and as applied to petitioner presents novel and important questions relating to the constitutional privilege against self-incrimination which have probably been erroneously decided below.

C. Denial of Due Process to Petitioner's Members

As we have seen, a final registration order against petitioner will bar its members from public and private employment, deprive them of other important privileges, including the right to obtain passports, and defame them by public listing. The members suffer these onerous sanctions regardless of their personal innocence and lack of knowledge of the alleged character of petitioner. Furthermore, they are afforded no opportunity to demonstrate at a hearing that they are fit persons to enjoy the privileges denied them. Instead, the bare fact of membership establishes a conclusive presumption of unfitness. In these respects, the Act violates due process. *Wieman* v. *Updegraff*, 344 U. S. 183; *Adler* v. *Board of Education*, 342 U. S. 485.[23] *Wieman* held that an individual may not be excluded even from public employment because of organizational membership, in the absence of his personal knowledge of the organization's alleged evil objectives. *Adler* held that membership with such knowledge can give rise only to a *prima facie* presumption of unfitness for public employment which the member must be given an opportunity to rebut. An individual's interest in private employment is obviously entitled to at least as much protection. Cf. *Greene* v. *McElroy*, 360 U. S. 474.

The court below disregarded *Adler*. It held that the *scienter* requirement of *Wieman* was satisfied on the grounds that (a) a member has knowledge of his membership; and (b), "The statute before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (R. 2103). These grounds are both irrelevant and untrue.

---

[23] It is clear that petitioner has standing to challenge the Act for imposing sanctions on petitioner's members. *N.A.A.C.P.* v. *Alabama*, *supra*, at 459; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

As *Wieman* makes abundantly clear, the *scienter* required by due process is knowledge that the organization has evil purposes. The requirement is not satisfied by knowledge of membership or knowledge or notice that the organization has been governmentally condemned.

Furthermore, in view of the vague criteria of membership established by section 5 of the Communist Control Act, it is not correct that "members" have knowledge of their "membership" (see *infra*, pp. 46-47). And it is a misreading of the statute to assume that knowledge or notice of a registration order[24] is a prerequisite to the imposition of the sanctions. Under the Act, such knowledge or notice is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the organization failed to list him (secs. 5(a), 6(a), 8(b), 15(a)(2)). But even this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment, the government must withhold a passport from him, and, if he is an alien, the government must deport him and may not naturalize him, all without reference to any kind of knowledge or notice on his part. (See secs. 6(b) and 5(a)(2) of the Act, and sections 241(a)(6)(E) and 313(a)(2) of the Immigration and Nationality Act.)

Clearly the decision below that the Act does not deny due process to petitioner's members conflicts with applicable decisions of this Court and with fundamental principles of due process.

D. Predetermination of Guilt

Since the order of the Board deprives petitioner and its members of liberty and property, it may not be entered without a hearing. *Joint Anti-Fascist Refugee Committee*

---

[24] Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the elements requisite to a finding that petitioner is a "Communist-action" organization have been determined by legislative fiat rather than by a free adjudication of the facts, the due process requirement of a hearing has been violated. *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Tot* v. *United States*, 319 U. S. 463.

The Act denies due process because facts essential to guilt are found legislatively and are not subject to administrative adjudication by the Board.

1. Section 3(3) of the Act defines a Communist-action organization in terms of its relationship to "the world Communist movement referred to in section 2." If there is no such movement, there can obviously be no Communist-action organization. Yet the existence and nature of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in section 2. The findings are then incorporated into sections 3(3) and 13(e) as assumptions of fact which the Board is not authorized to reexamine, but is required to accept as the foundation of its decision.

The court below agreed that the section 2 findings on the existence and nature of the world Communist movement are binding upon the Board and the courts and are not subjects for adjudication (R. 2132-33). The court nevertheless held that this did not constitute a denial of due process.

2. In addition, section 2 finds that "the Communist organization in the United States" engages in practices which satisfy the definition of a Communist-action organization (secs. 2(15) and 2(12)). It also finds that this organization has characteristics which satisfy at least four of the eight criteria which the Board is supposed to apply under section 13(e). (Cf. 2(5) with 13(e)(6); 2(6) with 13(e)(1); 2(7) with 13(e)(7); 2(9) with 13(e)(8).)

These findings, unlike those regarding the world Communist movement, are not expressly incorporated into the section 3(3) definition of a Communist-action organization and the evidentiary standards of section 13(e), and hence are ostensibly open for administrative determination. But obviously the Board is not free to overrule legislative findings on the identical issues it is supposed to determine.

Accordingly, the Act left nothing for the Board but to supply the name of the organization which Congress had in mind as "the Communist organization in the United States." This detail was furnished by the House and Senate reports accompanying the legislation,[25] as well as by the rest of the legislative history. Then, while this case was pending in the court below on the first review, Congress enacted the Communist Control Act, section 4 of which expressly identifies petitioner by name as a Communist-action organization. Thus the Board could not decide in petitioner's favor without overruling Congress.

The Act's built-in verdict against petitioner presents a major due process question, which should be reviewed.

E. The Act as a Bill of Attainder

"A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 71 U. S. 277, 323. As stated in *United States* v. *Lovett*, 328 U. S. 303, 315, and repeated in *Garner* v. *Board of Public Works*, 341 U. S. 716, 722:

> "* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

---

[25] The reports stated: "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." H. Rep. 2980, 81st Cong., 2d Sess., on H. R. 9490, pp. 1-2; S. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 5.

The Act, as we have seen, determines petitioner's guilt by legislative fiat and identifies petitioner and its members as the objects of statutory sanctions. But even if it is assumed, arguendo, that the Board was free to make an independent determination, the Act denies petitioner a judicial trial and imposes sanctions on "easily ascertainable members of a group." For petitioner is accorded only an administrative hearing, not a judicial trial, and the Act imposes various sanctions on the organization identified by the registration order and on its members. Accordingly, if the registration order and the sanctions "inflict punishment," the Act meets the definition of a bill of attainder and is invalid. Cf. *Lipke* v. *Lederer*, 259 U. S. 557.

The disabilities which the Act imposes on petitioner and its members are civil in form. Since *Cummings*, however, it has been clear that the deprivation of privileges constitutes punishment if the grounds for the deprivation have no reasonable relation to the individual's fitness to enjoy the privileges. *Garner* v. *Board of Public Works*, *supra*; *Dent* v. *West Virginia*, 129 U. S. 114; *United States* v. *Lovett*, *supra*. As stated in *Trop* v. *Dulles*, 356 U. S. 86, 95-96:

> "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

The "evident purpose" and effect of the Act are the imposition of punishment, not the accomplishment of some "legitimate governmental purpose."

(1) The Act makes compliance with a registration order impossible, since registration requires self-defamation, self-incrimination of the registrants, and identification of the persons registered as objects of onerous sanctions and possible prosecution. Hence, though posing as a regulatory disclosure statute, the Act insures that there will be no disclosure. Its true purpose and effect is not to secure registration, but to lay a foundation for mass prosecutions of petitioner's members and officers for not registering.

(2) The legislative history of the Act demonstrates that its purpose was not to regulate conduct of petitioner and its members, but to outlaw petitioner and permit prosecutions of all its members.[26]

In testifying on the parent Mundt-Nixon bill, Attorney General Clark advised the legislative subcommittee of the House Un-American Activities Committee that the Department of Justice had been unable to find evidence on which to prosecute petitioner or its members under the Smith Act or for not registering under the Voorhis Act and the Foreign Agents Registration Act.[27] It was this inability to prosecute petitioner and its members under existing legislation which the Act's sponsors cited as the justification for the Act. The Senate Report stated:

> "Congress has passed several laws which were directed specifically at curbing the subversive activ-

---

[26] Legislative history is relevant, and may be crucial, in determining whether disabilities are penal or legitimately regulatory. *United States* v. *Lovett*, *supra*.

[27] Hearings before Subcommittee on Legislation of House Committee on Un-American Activities, 80th Cong., 2d Sess., on H. R. 4422 and H. R. 4581, pp. 20-22 (Feb. 5, 1948).

> ities of communism in the United States, but they have proved largely ineffectual in accomplishing their purpose. As has been cited above, the Attorney General on February 5, 1948, testified before a committee of Congress that present laws were inadequate to deal with the subversive activities of the Communist threat in the United States." (Sen. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 7.)

Passages to the same effect appear in the House Committee Reports (H. Rep. 2980, 81st Cong., 2d Sess., on H. R. 9490, p. 2; H. Rep. 1844, 80th Cong., 2d Sess., on H. R. 5852, p. 5). Then-Representative Richard Nixon, one of the authors of the parent bill, made a similar explanation when testifying before the Senate Committee (Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 5852, pp. 41-43).

The House and Senate Committees made explicit the fact that the legislation was designed to outlaw petitioner. They explained in their reports why the bill used the registration scheme and did not illegalize petitioner by name:

> "To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat." (H. Rep. 2980, *supra*, at p. 5; Sen. Rep. 1358, *supra*, at p. 9.)

This purpose was later confirmed by the Congress when, abandoning its previous constitutional scruples, it specifically declared in sections 2 and 4 of the Communist Control Act that petitioner, by name, "should be outlawed" and that each member of petitioner "shall be subject to all the provisions and penalties of the Internal Security Act, of 1950, as amended, as a member of a 'Communist-action' organization."

(3) A regulatory statute would be confined to prevention of future deleterious conduct. But a registration order

proscribes the organization from engaging in any future activity, however innocent and beneficial. It is thus as obviously penal as execution of an individual. There are already available numerous penal statutes against the kind of guilty conduct ascribed to petitioner and its members by section 2 of the Act. The purpose and effect of the Act is not to control such conduct, for which the Act is unnecessary, but to suppress all the organization's activities, including those which are blameless.

(4) The Act's requirements and sanctions are penal individually as well as in their cumulative impact. Compelling self-defamation has the punitive function of the pillory and arm band. Requiring the invidious labelling of literature and broadcasts is punitive because it stigmatizes the organization and denies it an audience regardless of the content of the material. Non-punitive regulation would be based on content, as when obscene or lewd literature is barred. Cf. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-92. The limitation on financial contributions to the organization is similarly punitive, not regulatory, because it applies regardless of the purpose and use to be made of the contributions. Under the Act, members of petitioner are conclusively determined unfit and ineligible to hold public office, a wide range of private employment, passports, and, if recently naturalized, citizenship. The number and destructive impact of these sanctions demonstrates their penal nature. The members suffer much more than the single, limited "loss of position" which *American Communications Association* v. *Douds*, 339 U. S. 413, 414, held was intended merely "to forestall future dangerous acts." These sanctions, moreover, are imposed solely because of association, without reference to the fitness of the individuals to enjoy the denied privileges if judged on their own merits as individuals, and without regard to their lack of guilty knowledge.

F. The Imposition of Criminal Liability Without Judicial Determination of Facts Essential to Guilt

Once the administrative determination that an organization is a Communist-action organization becomes final, it is conclusive in criminal prosecutions of officers and members for failure to register, for holding employment forbidden to members, or for applying for passports. Membership in a Communist-action organization is an element of each of these offenses. But the determination that the organization is an action organization has been conclusively made in the administrative proceeding, and cannot be relitigated in the criminal trial. Moreover, if the prosecution is for failure of an individual to register himself as a member upon default of the organization, the issue of his membership is also adjudicated administratively (secs. 8, 15).

Accordingly, the Act presents the major constitutional problem which the Court did not reach in *United States* v. *Spector*, 343 U. S. 169, but which Justices Jackson and Frankfurter, dissenting, considered to invalidate the self-deportation statute there involved. The dissent, relying on *Wong Wing* v. *United States*, 163 U. S. 228, pointed out that an administrative (or, as in *Wong Wing*, a non-jury) adjudication of a status may not constitutionally be made conclusive in a criminal prosecution for a failure to perform duties consequent on the status.

The objections to the *Spector* statute, raised in Justice Jackson's opinion, clearly apply to the present Act. Justice Jackson stated (at 177-78):

> "This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes

> conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. * * * And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act is even more vulnerable than the statutes involved in *Wong Wing* and *Spector*. In those cases the accused had been a party to the administrative or non-jury proceeding. But under the Act, the member accused of not registering, applying for a passport, or holding a forbidden job, is not a party to the administrative proceeding which determines that the organization is a Communist-action organization. Nevertheless, this determination, made without benefit of judge or jury, is conclusive in a prosecution against him.

G. Denial of an Impartial Tribunal

Due process requires "a tribunal which meets at least currently prevailing standards of impartiality" (*Sung* v. *McGrath*, 339 U. S. 33, 50) and is "not biased by an interest in the event." *Fay* v. *New York*, 332 U. S. 261, 288; *Re Murchison*, 349 U. S. 133, 136; *Tumey* v. *Ohio*, 273 U. S. 510.

In violation of this principle, the Act exerts compelling pressure on the Board to decide against petitioner and gives the Board members a personal stake, financial and otherwise, in so deciding.

The Board is set up as a permanent agency, which, at the time the order against petitioner was issued, had the

sole function of identifying Communist-action organizations, their members, and Communist-front organizations. Since Communist-front organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.[28]

The Act (see sec. 2(15)) and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner. And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principal organization of that character.

Both the Board and the Attorney General have recognized that a Board holding in favor of petitioner would put the Board out of business. The first two chairmen of the Board informed Congressional appropriations committees that the continued functioning of the Board depended entirely upon the entry of a registration order adverse to petitioner.[29] The Attorney General instituted no proceeding under the Act against any other organization during the two years that the case against petitioner was pending before the Board. But two days after the Board issued its decision against petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations and that petitioner was the Communist-action organization which controls them. All subsequent peti-

---

[28] After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (Sec. 3(4A)).

[29] Hearings before Subcommittee of Comm. on Appropriations: On 2d Suppl. Appropriations Bill for 1951, H. R., 81st Cong., 2d Sess., p. 263; On Independent Offices Appropriations for 1953, H. R., 82d Cong., 2d Sess., pp. 245, 248; On Independent Offices Appropriations for 1954, H. R., 83d Cong., 1st Sess., pp. 188, 190, 196-198.

tions filed by the Attorney General have charged the accused organization with being "fronts" of or "infiltrated" by petitioner. In the nine years since the Act was passed, only one organization, the petitioner, has been charged before the Board with being a Communist organization.

It is clear, therefore, that if the Board had decided that petitioner was not a Communist-action organization, there would be no other organization which could be proceeded against under the Act. Thus the Board would have rendered itself *functus officio*, deprived the Board members of the perquisites of office, and effectively repealed the Act. The Board, therefore, could not be the impartial tribunal required by due process.

H. The Irrationality of Section 13(e)

Legislation violates due process if it permits liability to be determined on the basis of criteria which are irrelevant to the ultimate issue or are too vague to supply an ascertainable standard of judgment. *Tot* v. *United States*, 319 U. S. 463; *Manley* v. *Georgia*, 279 U. S. 1; *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Bailey* v. *Alabama*, 219 U. S. 219; *Winters* v. *New York*, 333 U. S. 507; *Musser* v. *Utah*, 333 U. S. 95; *Connally* v. *General Construction Company*, 269 U. S. 385.

In conflict with this principle, section 13(e) requires the Board to apply standards which have no rational relation to the ultimate issue to be determined under section 3(3) and are vague and indefinite.[30]

---

[30] John W. Davis, Charles Evans Hughes, Jr. and Seth W. Richardson advised the Senate Judiciary Committee that in their opinion the vagueness of the similar section of the Mundt-Nixon bill, the antecedent of the Act, rendered the entire bill unconstitutional. *Hearings before Senate Judiciary Committee*, 80th Cong., 2d Sess., on H. R. 5852, pp. 417, 421, 445.

Section 3(3) defines a Communist-action organization in terms of (a) Soviet control and (b) advancement of the seditious objectives attributed by section 2 to the world Communist movement. However, none of the criteria which section 13(e) establishes for the Board's determination has any relevance whatsoever to the advancement of seditious objectives, and still less to the specific seditious objectives attributed by section 2 to the world Communist movement. Only the first two standards of section 13(e) have anything to do with objectives, and neither of these requires proof that the objectives referred to are seditious or evil. The court below recognized that the second standard ("non-deviation") had no relevance to the objectives element of the 3(3) definition (R. 2122).

As to the foreign-control component of the definition, section 13(e) supplies criteria which are nebulous, circumstantial, and largely irrelevant. For example, the "non-deviation" standard (sec. 13(e)(2)), as applied in this case (*supra*, p. 16), permits foreign control to be inferred from a similarity of the organization's views to those of the Soviet Union even though the views were adopted by the organization in advance of the Soviet Union, and are demonstrably true, widely held by non-Communists, reasonably deducible from the facts, or independently arrived at by the organization. Similarly, as the court below recognized (R. 2123), the "financial aid" standard (sec. 13(e)(3)) is satisfied merely by evidence of receipt of aid, without regard to the considerations which determine whether the aid is an instrument of control, namely, the terms and conditions, if any, on which the aid is extended. And section 13(e)(5) makes "reporting" proof of foreign control without regard to the nature of the "report", the purpose for which it was given, and its use, if any, by the recipient.

I. Denial of Due Process by Section 5 of the Communist Control Act

The Act makes it necessary for petitioner and its officers to determine who are members of petitioner. If the order of the Board becomes final, petitioner and its officers will be required to list the names of all the members in petitioner's registration statement (sec. 7(d)(4)). Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs or apply for passports. They must make the same determination in order to know whether they must register themselves upon the failure of the organization to file a registration statement listing their names.

Section 5 of the Communist Control Act (50 U. S. C. 844) sets forth thirteen criteria for determining membership in the Communist Party. In preparing a registration statement, petitioner and its officers must apply these criteria if they are to avoid the criminal penalties of section 15 of the Act for failure to list a member or for making a false listing. Other persons must similarly apply the section 5 criteria if they are not to incur the penalties of the Act for engaging in conduct forbidden to members of Communist-action organizations and for failure to register themselves if petitioner does not list their names.

The criteria of section 5, however, are both irrational and vague. Furthermore, they require persons seeking to apply them to have knowledge which they can neither have nor obtain.

For example, the twelfth criterion of membership is whether an individual has ever "indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization." Besides being intolerably indefinite, this criterion requires an officer seeking to list all members to be aware of every "word, action,

conduct, writing" of every individual in the United States, and it requires an individual seeking to determine whether he is a member to know all the organization's "plans, designs, objectives, or purposes."

We need not dwell on the other criteria, since they palpably share the same vices. A further irrational feature of the section is the fact that it establishes identical criteria for such different relationships to petitioner as "membership", "participation" and "knowledge" of petitioner's purpose or objective.[31]

III. The decision below erroneously decided basic questions concerning the interpretation and application of the Act.

This petition raises major issues, never considered by the Court, regarding the construction and application of the Act by the Board and the court below. In what follows we demonstrate that the issues were incorrectly decided below. As a result, a political party has been outlawed on the basis of evidence and standards which do not satisfy the provisions of the Act. Moreover, the rulings below, if allowed to stand, will be applied in pending and future "front" and "infiltrated" cases.

---

[31] It is arguable that the criteria of section 5 can be construed to apply only to cases where the membership of the accused is in issue, and hence would not apply in a prosecution of petitioner's officers for failure to list all of the members. Such a reading seems unsound, since it would establish a dual test of membership under which an individual could be found to be a member for the purposes of self-registration but not a member for the purposes of registration by the organization. In any event, the criteria of the section are plainly applicable in prosecutions of alleged members. Hence petitioner is presently injured by the fact that the criteria make it dangerous for any person to associate or have business dealings with petitioner or to express views similar to those held by it. This circumstance alone gives petitioner standing to litigate the validity of the section. (See cases cited, *supra*, p. 33, ftn. 23.)

A. The Meaning of Foreign Control

The section 3(3) definition of a Communist-action organization requires the presence of two components, the first of which is that the organization be "substantially directed, dominated, or controlled" by the Soviet Union.

This postulates a relationship in which the Soviet Union exercises a power to exact compliance with its demands from a domestic organization. It is not satisfied by an organization's voluntary adherence to Soviet policies or objectives. "The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considerations without binding force." *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 153-54. "Control" means "power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dict. (4th ed.) p. 399; *Pacific Employer Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 228 F. 2d 365, 368; *American Auto Trimming Co.* v. *Lucas*, 37 F. 2d 801.

Control, therefore, presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance. Absent any such means, control is not present. If conformity nevertheless exists, it is voluntary, not the product of control.

Control exists in the relationships of superior officer and soldier, employer and employee, principal and agent, controlling stockholder and corporation, because in each instance there is a mechanism for exacting conformity. But control does not exist in the cases of the parishioner who attempts to live in accordance with the principles preached by his minister, the economist who is a disciple of Keynes, the man who out of friendship mows the lawn of his vacationing neighbor, or the boy who imitates the batting stance of a baseball star. These involve no control

because there is no significant mechanism to enforce compliance, even though there is adherence to another's precepts, the serving of another's interests, or the copying of another's actions.

The Act requires not merely a latent power to control, but its exercise. This necessarily means that the subordinate must act on orders from the superior. Ordinarily, too, a control situation involves features designed to insure satisfactory compliance with the orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander.

This principle, that the first component of section 3(3) involves compliance which can be exacted rather than voluntary conformity, derives not only from the natural meaning of the terms "direction, domination or control," but also from their context in the Act. An organization will meet the second component of section 3(3) of the Act, i.e., will operate primarily for the purpose of advancing Soviet objectives, either because it has to or because it wishes to. That is, the second component involves voluntary conformity at a minimum. Accordingly, if the first component requires no more, it is redundant.[32]

That section 3(3) refers to an enforceable control also appears from section 2(5), which describes Communist-action organizations as "organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country." Finally, imposition of the Act's

---

[32] On the other hand, the second component cannot be considered redundant on the theory that a controlled organization will necessarily promote the objectives of the controller. For the second component is satisfied only if the organization promotes *certain* objectives of the controller, i.e., the seditious objectives described in section 2, as distinguished from other possible objectives, including those which are innocent.

severe sanctions for a conformity which stems from nothing more than ideological agreement would magnify the First Amendment objections to the Act.

It is clear that the Board did not, and could not, make findings of the essential elements of control, namely, (a) that the Soviet Union has any means of exacting compliance from petitioner and (b) that it gives orders to or supervises petitioner.

There was, of course, no showing or finding that the Soviet Union can exercise physical or police power over petitioner. Neither was there a showing or finding of any other means by which the Soviet Union can enforce conformity by petitioner to Soviet desires. If there had been any evidence that the Soviet Union subsidizes petitioner, the withdrawal or threatened withdrawal of financial aid might supply a lever of control. As the Modified Report acknowledges, however, "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2568). Thus we are left with no means of enforcement, and therefore with no control.

Secondly, there was no evidence of Soviet directives or orders to petitioner. The Modified Report makes no finding that petitioner receives directives from abroad, and cites no instance of claimed Soviet directives after petitioner's disaffiliation from the Communist International in 1940 (*supra*, p. 14).

Finally, the record contains no evidence that petitioner is supervised by or reports to the Soviet Union. The Modified Report cites no instance of reporting or supervision after 1945 at the latest. In fact, there is no evidence of either after petitioner's disaffiliation from the Communist International. (See *supra*, pp. 14-15.)

Indeed, the record shows no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International. The only contacts

shown after the disaffiliation were these: (1) In 1945, while on a trip to France, Elizabeth Gurley Flynn, a member of petitioner's National Committee, met some Russian women at an international women's conference and conversed with them about child care, post-war reconstruction, and the rights of women (R. 2576, 1298). (2) In 1949, petitioner sent Stalin a telegram congratulating him on his 70th birthday and praising the Soviet Union (R. 2580-81). (3) In December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (R. 2582-83). (4) Petitioner's publications sometimes reprinted articles from Soviet publications, and its leaders and members sometimes read the publication of the now-defunct Communist Information Bureau (R. 2522). (5) The Daily Worker had a correspondent in Moscow (*ibid.*).[33]

The court below affirmed the Board's order only by emasculating the foreign control component, eliminating, consecutively, both of its elements. In its second opinion it acknowledged that "there is no showing that the Soviet has any means of enforcing conformity by the Party with Soviet desires" (R. 2760). It held that the Act required no such showing, stating:

> "An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion * * *. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met." (R. 2761.)

---

[33] Moreover, petitioner's witnesses Gates and Flynn testified that during their tenure on petitioner's National Committee (since 1938 and 1946, respectively), there were no foreign representatives to petitioner, and petitioner received no foreig directives or aid, did not report, and was not under foreign supervision or control (R. 1211-16, 1223-24; Tr. 15783-96).

For reasons already stated, this is an erroneous interpretation of the control component. But even this interpretation requires evidence that there were Soviet directives which petitioner could voluntarily follow. The Board, however, found none; the court below cited none; and, in fact, there is no evidence of any such directions since petitioner's disaffiliation from the Communist International in 1940.

In its latest opinion, the court below summarized the facts which induced its decision against petitioner. So far as petitioner's current relationship with the Soviet Union is concerned, these facts amount to nothing more than petitioner's "intellectual affiliation" to the cause of Communism. (R. 2842-43.) Whether "intellectual affiliation" satisfies the requirement of foreign control and justifies the harsh measures of the Act presents a major question for this Court.

B. The Reliance on Pre-Act Conduct

Under the Act, the Board must determine whether an accused organization is a Communist-action organization at the time of the proceeding (secs. 12(e), 13(e), (g), (h)). Accordingly, the Board was required to base its findings and order upon current conduct of petitioner. Petitioner's practices prior to the date of the Act were relevant, if at all, only to the extent that they served to show or explain the purposes or character of post-Act activities. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705.[34]

The opinion below and the Modified Report show on their face that this principle was violated. They base the finding that petitioner is under foreign control on claimed practices of petitioner which were concededly discontinued at least ten years prior to enactment of the Act. This ap-

[34] This decision states (at 706) that evidence of past transactions is not admissible even for this limited purpose where, as here, the effect of the proceeding is "to punish or to fasten liability on respondents for past conduct."

pears from the Summary of the Modified Report (R. 2608-09), whose dominant theme is as follows:

1. Petitioner, by joining and assuming the obligations of membership in the Communist International, thereby subjected itself to Soviet control.

2. Petitioner's disaffiliation from the Communist International in 1940 and the dissolution of the Communist International in 1943 were of no consequence because both the Soviet Union and petitioner continued to believe in and practice the principles of Communism.

3. Ergo, the Soviet control of petitioner which existed while petitioner was a member of the Communist International continues.

As the Board summarized its Summary (R. 2609):

> "The short of it is this * * * the Communist Party began its history by voluntarily sumitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement. The record shows that neither the basic program or objectives of the Soviet led world Communist movement nor those of [petitioner] have changed."

This theory was not visible in the original Report and was plagiarized from the first opinion of the court below (R. 2141-42). The court adhered to the theory in its latest opinion when it emphasized that petitioner "was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods" (R. 2842).

The failure of petitioner to repudiate the objectives or methods of the Communist International cannot serve as evidence that petitioner is currently under Soviet control. If petitioner was controlled by the Soviet Union through the International, this was because petitioner received instructions from and was supervised by the International,

and was liable to expulsion and the loss of financial subsidies for disobedience of International decisions.

But petitioner withdrew from the International in 1940, and the International dissolved in 1943. There is no evidence that subsequent to the disaffiliation petitioner received foreign directives or supervision. The means of exacting compliance also vanished. Petitioner could not be expelled from an organization to which it no longer belonged or which no longer existed. Withdrawal of financial aid could not be an instrument of control because petitioner no longer received any. Hence, with the disaffiliation from the International (not to mention the latter's subsequent dissolution), there disappeared all the means and incidents of control, and necessarily control itself. That petitioner continued to adhere to its previous views was irrelevant, because the adherence was its voluntary choice, not a product of control.

It is clear, therefore, that the Board and the court below violated the *Cement Institute* rule (at 705), that "prior transactions" are relevant only "to show the purpose and character of the particular transactions under inquiry." The only "transactions" relevant to control were discontinued after 1940. There were no subsequent "transactions" to be illuminated by evidence of the discontinued ones.

The evidence of current practices here is far weaker than in *United States* v. *Oregon Medical Society*, 343 U. S. 326, where the Court reversed an anti-trust injunction, saying (at 334):

> "Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices."

C. The Construction and Application of Section 13(e)

Novel questions of importance to the administration of the Act are presented by the construction and application given in this case to the evidentiary criteria of section 13(e).

(a) The major instance is the Board's construction of the "non-deviation" standard (sec. 13(e)(2)). The dictionary definition of "deviation" is a variation from an already established position. Furthermore, coincidence of views has no rational tendency to prove the foreign control component of section 3(3) unless the alleged foreign principal formulated the view first. Accordingly, the standard requires a showing that the Soviet view on a particular subject antedated the petitioner's view. Moreover, an identity of views is not a rational test of foreign control if the view of the alleged principal is demonstrably true or is widely held by those who are concededly not under its control. Likewise, a similarity of non-seditious views has no tendency to prove advancement of seditious objectives, the second component of section 3(3).[35]

The Board and the court below construed "non-deviation" contrary to its dictionary definition and so as to make it an irrational test of a Communist-action organization as defined by section 3(3). As we have seen (*supra*, p. 16), the Board ruled that it was irrelevant whether petitioner reached its views in advance of the Soviet Union;[36] whether the similarity of views arose out of the

---

[35] The court below held that the non-deviation standard is relevant only to the foreign control component of section 3(3), and not to the objectives component (R. 2122).

[36] The Court below held, in affirming the Board on this point: "The statutory phrase ['do not deviate from'] refers to identity or coincidence and not to chronological adoption" (R. 2146). At the hearing, counsel for the Attorney General stated that he was not required, and would not attempt, to show that the Soviet view antedated petitioner's view (R. 81-82, 836; Tr. 10934-35) and resisted petitioner's attempts to show that it had reached certain of the views first (R. 836; and see Tr. 10903).

independent application by each of common principles;[37] and whether the views were true, reasonable, generally accepted, and calculated to promote the best interests of the United States.[38]

The significance of these misconstructions of the non-deviation standards extends beyond this case, since "non-deviation" from petitioner's views is one of the tests of a Communist-front organization (sec. 13(f)(4)).

(b) The Board made a finding under section 13(e)(5) that petitioner "upon occasion" reports to the Soviet Union (R. 2583). Aside from the total absence of evidence to support the finding (*supra*, pp. 14-15), it is clear that the Board misapplied the standard. "Reporting" has a rational tendency to prove foreign control only if the report is made to facilitate supervision of the accused organization. Reports may also be made for the purpose of exchanging information between equals, as, for example, when a scientist reports on his research to a convention of his fellows. The Board made no finding on the contents, purposes, or use of the alleged occasional reports. It thus assumed, contrary to reason, that any kind of "reporting" is evidence of foreign control.

---

[37] R. 842-44. The Attorney General stated that, "We have not made any attempt to show how the Communist Party reached the views that it did" (R. 836). The Attorney General's expert witness on "non-deviation" testified that he was unable to conclude that petitioner had not arrived at its views independently (R. 837-38). Nevertheless, the Board ruled in its Modified Report (R. 2562) that "the great weight of the evidence is to the contrary" of petitioner's contention that it had reached its views independently.

[38] R. 2556; and see, e.g., R. 864; 836-37; 844-45; 839, 840, 845, 861-64, 1274-75. A typical example was the exclusion of evidence designed to support the validity of the view that the Chiang Kai-shek regime was corrupt (R. 836-37). The Attorney General's stated position was that "it does not matter whether the Soviet view on these issues which were raised were [sic] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people" (Tr. 8878).

(c) The Board's finding under the "allegiance" criterion (sec. 13(e)(8)) conflicts with this Court's decision in *Schneiderman v. United States*, 320 U. S. 118 (*supra*, p. 17).

(d) In applying the "directives and policies" test (sec. 13(e)(1)), the Board found that certain of petitioner's policies have "as their fundamental purpose to effectuate Soviet policies and further the world-Communist movement" (R. 2554). It is unclear from the Modified Report whether the Board supposed that this finding helped establish the foreign-control component of a Communist-action organization. Obviously it cannot, there being no finding of foreign directives.

The Board must have relied on this finding to support its holding that the evidence satisfies the "objectives" component of the section 3(3) definition. This component, however, is limited to the advancement of the objectives "referred to in section 2," all of which are seditious. If section 13(e)(1) is to furnish a rational test of section 3(3), the policies to which it refers must be similarly confined. The Board, however, relied on petitioner's alleged forwarding of policies which are not, and were not found to be, seditious (see *supra*, pp. 16-17).

(e) The Board's "discipline" finding (sec. 13(e)(6)) was erroneously based on evidence of disciplinary measures adopted by petitoner on its own initiative, there being no evidence of discipline imposed by or at the behest of the Soviet Union (*supra*, p. 15).[39]

In sum, the absence of meaningful evidence against petitioner compelled the Board to interpret and apply section 13(e) so as to magnify and add to the irrationalities apparent from the text of the subsection.

---

[39] It is unnecessary to discuss the remaining three criteria of sec. 13(e). The court below struck one ("secret practices") as unsupported by the evidence, and the Board found that the practices referred to in the others ("financial aid" and "training") had been discontinued long before enactment of the Act. See *supra*, pp. 5, 7, 14.

D. The Meaning of "World Communist Movement"

As we have seen (*supra*, p. 35), the court below held that the findings of section 2 of the Act with reference to the existence and nature of a world Communist movement were conclusive upon the Board and the courts. Nevertheless, it reviewed and sustained the finding of the Board that on the evidence, "there exists a world Communist movement, substantially as described in section 2 of the Act" (R. 2138, 2495). This conclusion was based on the court's finding that there is a world Communist movement in the sense that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a "classless, stateless society ruled by the proletariat of the world" (R. 2137).

The movement found by the court below is palpably not *the* world Communist movement postulated in section 2 of the Act. The key characteristics of that movement are a highly centralized organization, rigid Soviet control, and use of violent and criminal means. Thus subsections (1), (5) and (8) of section 2 describe the movement as operating "through the medium of a world-wide Communist organization," of which the Communist parties of the various countries are "sections" and "affiliated constituent elements." Subsections (4) and (5) find that the control of the world Communist movement is vested in the "Communist dictatorship of a foreign country" through the medium of "action organizations" which are "sections of a world-wide Communist organization." And subsections (1) and (11) find that the world Communist movement employs espionage, sabotage, terrorism and treachery.

Neither the court below nor the Board found, or could have found from the evidence, the existence of a movement having these characteristics. The only organization which was a "world-wide Communist organization" was the

Communist International, dissolved in 1943.[40] In the absence of such an organization, there could be no foreign control of the movement "through the medium" of the organization. Furthermore, the record is devoid of evidence of the means employed by the Communist parties of other countries to achieve their objectives. It is equally devoid of evidence that petitioner has committed or advocated acts of terror, sabotage or espionage.

IV. The order of the Board is not supported by the evidence.

Section 14(a) requires that the Board's order be supported by the preponderance of the evidence. It is clear that this standard has not been satisfied. Our previous discussion has shown the following:

(1) There is no evidence that petitioner is under Soviet direction, domination or control, as required by the first component of the section 3(3) definition (*supra*, pp. 48-52).

(2) There is no evidence that the practices described in section 13(e) are engaged in by petitioner (*supra*, pp. 55-57).

(3) There is no evidence that there is a world Communist movement which meets the description of section 2 (*supra*, pp. 58-59).

---

[40] The now-defunct Communist Information Bureau, mentioned by the court below (R. 2137), was not, and was not found to be, the organization described in section 2. Its membership was not worldwide, but was confined to the Communist parties of eight European countries (R. 17; 1592). It was not a centralized organization; as the Board's Original Report stated, and a witness for the Attorney General testified, it was a medium for "mutual consultation and voluntary coordination of action" among the member parties (R. 7; 937-38; 971). Moreover, the court below acknowledged (R. 2142) that petitioner was not affiliated with the Communist Information Bureau, and the uncontradicted evidence shows that petitioner never had dealings with it (R. 1205-10; 1286-89).

In addition, the evidence does not satisfy the second component of the section 3(3) definition, namely, that petitioner operates primarily to advance the objectives of the world Communist movement referred to in section 2.

Apart from the fact that there is no movement which meets the section 2 description, the evidence fails to show that petitioner operates to advance the objectives described in that section. These are: (1) the overthrow of all existing capitalist governments by any means deemed necessary, including espionage, sabotage, terrorism, force and violence (sec. 2(1), (6)), and (2) the establishment in all countries of "Communist totalitarian dictatorships" (sec. 2(1), (2), (3)), which (3) "will be subservient to the most powerful existing Communist totalitarian dictatorship" (sec. 2(1), (6)).[41]

1. The first objective excludes organizations which seek to establish socialism or Communism by peaceful means or which advocate forcible overthrow only as abstract political doctrine, divorced from present incitement to action. Such organizations could not present the "clear and present danger" which Congress found in section 2(15), and a contrary reading of section 2 would magnify the constitutional vices of the Act. Cf. *Yates* v. *United States*, 354 U. S. 298. Yet the evidence on which the Board relied to find that petitioner advocates violent overthrow is the same as that which *Schneiderman* held to be insufficient to prove non-attachment to the Constitution and which *Yates* held (at 329) did not meet the incitement standard. (See *supra*, p. 13.)

---

[41] The element of subservience also appears from section 2(15), which states that the Act is required "to preserve the sovereignty of the United States as an independent nation." Section 4(a) likewise makes clear that the Act was not directed against the establishment in this country of an autonomous "totalitarian dictatorship," but only one under foreign control.

2. Section 2(2) spells out the second objective of the world Communist movement by describing "totalitarian dictatorship" as a form of government that "results in the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality." Section 3(15) defines "totalitarian dictatorship" in similar terms.

The Modified Report finds from its examination of Marxist writings that the primary objective of Communism is to supplant capitalist governments "by socialist states under dictatorships of the proletariat (working class), which we find is a dictatorship [sic] of a Communist party" (R. 2444, and see also R. 2494, 2495, 2607). The court below held this to be a finding that it is petitioner's objective to establish a totalitarian dictatorship within the meaning of the Act (R. 2761). This seems doubtful. But in any event, a finding which equates a "dictatorship of the proletariat" with the "totalitarian dictatorship" described in section 2, is contrary to the plain meaning of the texts on which the Board relied as well as to this Court's reading of the same texts. *Schneiderman* v. *United States, supra,* at 142, described the dictatorship of the proletariat as follows:

> "In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does

not appear that it would necessarily mean the end of representative government or the federal system."

The uncontradicted testimony of petitioner's witness Aptheker establishes that petitioner understands and used the term dictatorship of the proletariat in the sense defined by the Court (R. 2437).

It is thus apparent that the term, as understood by the Court and petitioner, has nothing in common with the "totalitarian dictatorship" which section 2 postulates as an objective of the world Communist movement. Accordingly, if the Board found to the contrary, its finding is without evidentiary support.

3. There is no evidence, and the Modified Report makes no finding, that petitioner has the objective of establishing a government in this country that will be subservient to the Soviet Union. Moreover, the Modified Report seems to recognize that existing Communist governments outside of the Soviet Union are not Soviet puppets. For it finds that the governments of China and the Communist countries of Eastern Europe are "dictatorships of the proletariat controlled by a *national* Communist Party *in alliance with* the Soviet Union" (R. 2487, emphasis supplied, and see R. 2493-94).

Review of the preponderance questions is demanded by the manifest errors of the Board and the court below and the unprecedented effect of the order in outlawing a political party. It is also required because the finding against petitioner concludes the rights of other organizations. The Act contemplates that once petitioner is finally found to be a Communist-action organization, this issue cannot be relitigated by organizations accused of being "fronts" or "infiltrated" or by individuals required to register themselves as members of "action" organizations. In issuing

the first registration order against an organization accused of being a Communist-front, the Board held that "the prior determination by the Board that the Communist Party is a Communist-action organization is conclusive and applicable in this proceeding without further proof." Report of the Board, *Rogers* v. *Labor Youth League*, No. 102-53, Feb. 15, 1955, pp. 54-55. The Board has applied the same rule in all subsequent cases.

V. The refusal to strike all of Budenz' testimony because of his unavailability for cross-examination presents a novel and important question.

This case presents the question whether all the testimony of Budenz should have been stricken because petitioner was deprived, through the fault of the Attorney General and the Board, of the opportunity to cross-examine him with the aid of his prior statements on two key matters. The circumstances which give rise to this question had their origin at the original Board hearing in 1952. Budenz then testified, *inter alia*, about two supposed incidents which are referred to in the litigation as the Starobin letter and the Weiner conversation.

Budenz' testimony about the Starobin letter was as follows. In May, 1945, before the Duclos article criticizing the dissolution of the American Communist Party was known in this country (see *supra*, p. 18, ftn. 12), Budenz hastily read part of a letter from Starobin, a Daily Worker correspondent at the United Nations conference in San Francisco. The letter reported that Manuilsky, a Soviet delegate, had told Starobin that "the American Party should observe more carefully the guidance and counsel of the French Communists." (R. 1135-37, 1182.) The obvious inference from this testimony is that the Duclos article was a Soviet-inspired directive to petitioner, and the court below so regarded it in its initial opinion (R. 2143).

Budenz' testimony concerning the Weiner conversation was that in 1939 he and Morris Childs had a talk with Weiner, then treasurer of petitioner, about securing funds for the Midwest Daily Record, which Budenz edited. Childs asked Weiner "if he couldn't get some money from abroad".[42] Weiner replied that "we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be reestablished so money could come." (R. 1124-25.) The original Report and First Modified Report cited this testimony in support of the finding that petitioner had received Soviet financial aid (R. 88, 2564).

On cross-examination, Budenz stated that he had orally reported these incidents to the FBI (R. 1184-85; 1180-82). He conveyed the impression that no recording or transcription of any of his oral reports had been made. Objections interposed by the Attorney General and sustained by the Board precluded petitioner from exploring the matter further (Tr. 14003-04, 14120-22). Petitioner moved for the production of any FBI reports of interviews with Budenz concerning the Starobin letter and the Weiner conversation. The Attorney General objected to the motions, and the Board denied them. (R. 1184-85, 2277-78, 128.)

Following the remand by this Court, petitioner again moved the Board for the production of the FBI reports on the Starobin and Weiner matters or for their *in camera* inspection by the Board. Again the Board sustained objections interposed by the Attorney General. (R. 2187-89; 2217-18, 2225.) The court below initially affirmed this ruling on the ground that there did not appear to be any statements[43] on the two matters in the possession of the FBI

---

[42] Budenz testified that "abroad" meant "Moscow" (R. 1126).

[43] As defined by 18 U. S. C. 3500, which was enacted after the conclusion of the proceedings before the Board on this Court's remand.

(R. 2733), counsel for the Board having so represented in their brief (Respondent's Brief following Remand, pp. 18, 46). However, in response to a petition for rehearing filed by petitioner, the Board disclosed for the first time that the FBI had in its possession disc recordings of a five-day interview with Budenz in 1945, which contained statements pertinent to the Starobin and Weiner matters (R. 2804-05, 2813). As a consequence, the court below ordered the production to petitioner of statements made by Budenz to the FBI concerning the two matters (R. 2820-22).

In the Board proceedings that followed, statements by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and from FBI memoranda of later interviews [44] and furnished to petitioner (R. 2387-89).[45] Budenz' ill health made it impossible to recall him for cross-examination on these statements. Petitioner therefore moved to have all of the testimony of the witness stricken because of his unavailability for cross-examination. The Board struck Budenz' testimony on the Starobin and Weiner matters but refused to strike anything else. (R. 2301-02, 2387-89.) The court below affirmed (R. 2839-40), Judge Bazelon dissenting on the ground that Budenz' unavailability required that all of his testimony be stricken (R. 2844).

The decision below presents an important question, not heretofore passed on by the Court, concerning the consequences of a deprivation of cross-examination because of the supervening death or illness of a witness. Wigmore states the applicable principle to be that where the party calling a witness is responsible for the deprivation, all of his testimony must be stricken. And even where the call-

[44] The Attorney General agreed that the Board might treat the memoranda as statements within the meaning of 18 U. S. C. 3500 (R. 2389).

[45] The unexcised documents were made part of the record as sealed exhibits. See Bd. Exs. 2, 5, 6, 7.

ing party is without fault, all the testimony must nevertheless be stricken if the loss of cross-examination is a material loss. Wigmore on Evidence (3rd ed.), sec. 1390.

It is clear, and the majority below did not dispute, that the Attorney General and the Board were responsible for depriving petitioner of its right to cross-examine Budenz with the aid of the FBI statements. First, the Attorney General's objections and the Board's rulings denied petitioner access to the statements at a time when the witness would have been available for cross-examination. Second, the Attorney General withheld the fact that the FBI had the statements in its possession until it was too late to recall Budenz.[46] Under Wigmore's rule (never mentioned by the majority below), these facts alone required that all of Budenz' testimony be stricken, without considering whether the deprivation of cross-examination was a material loss to petitioner.

In addition, the deprivation of petitioner's right to cross-examine Budenz with the aid of the prior statements was a material loss, which was not repaired by striking his testimony on the Starobin and Weiner matters. As the dissenting opinion points out (R. 2844), "Without such cross-examination the Party is denied the right to show the extent, if any, to which the rest of Budenz' testimony is tainted." And a showing of taint would have required the Board to strike all of his testimony.[47] *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1.

The majority below held that cross-examination could not have established any taint because Budenz' testimony

---

[46] His health would have permitted his recall when petitioner renewed its motions for production of the statements after this Court's remand (R. 2187, 2191, 2225; Tr. 18122; Bd. Ex. 3-C).

[47] The 2d Mod. Rep. relies on Budenz' testimony for a number of important findings, e.g., that petitioner reported to and received financial aid from the Soviet Union after 1940 (see *supra*, p. 14, ftn. 7).

and prior statements on the Starobin and Weiner matters "bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ" (R. 2839). This defeats the principle that "only the defense is adequately equipped to determine the effective use" of a witness' prior statements for the purpose of impeachment. *Jencks* v. *United States*, 353 U. S. 657, 688-89. Furthermore, the court's characterization of the statements flies in the face of the facts, as an examination of the statements (R. 2358-72) shows. We limit ourselves to one example, which relates to the supposed conversation with Weiner.

In the 1945 recorded interview, Budenz made several references to his efforts to raise money for the Midwest Daily Record. But he did not mention a conversation with Weiner on this or any other subject. On the contrary, he stated in response to repeated questions that he had no knowledge or "indication" of the availability of Soviet or other foreign funds to petitioner or its publications. (R. 2358, 2361-64.) When pressed further, Budenz added:

> "Now the only thing I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being sort of a super, ahhh—*that's just surmise you understand.* You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something." (R. 2364; emphasis supplied.)

Thus in 1945, Budenz knew of no indication that petitioner had received funds from abroad and could only surmise that, if it did, Weiner was somehow involved. Yet, as we have seen, when Budenz took the stand seven years later, he was able to "recall" a 1939 conversation in which Weiner acknowledged that petitioner had received Soviet financial aid. Far from bearing "a solid similarity," the prior statement and the testimony are contradictory. Similarly, Budenz' testimony on the Starobin

letter (R. 1135-37, 1182) is contradicted by his 1945 and 1946 statements (R. 2360, 2365-66). In both cases, the inference is almost inescapable that Budenz either deliberately concocted his testimony or is incapable of distinguishing fact from fantasy. In any event, this might have been established by cross-examination.

The Board found that Budenz' testimony on the Starobin and Weiner matters was not deliberately false and evaluated the remainder of his testimony accordingly (R. 2390-91). Cross-examination with the aid of the impeaching statements might have established deliberate falsity even to the Board's satisfaction, and required it to disregard or substantially discredit all the Budenz testimony. Hence the deprivation of cross-examination was a material loss to petitioner. Under the Wigmore rule, therefore, all of Budenz' testimony should have been stricken even if the Attorney General and the Board had not been responsible for the deprivation.

VI. The refusal to order the production of relevant prior statements of witnesses is inconsistent with or misapplies decisions of this Court.

A. The Gitlow Memorandum

In 1940, Gitlow gave the FBI a quantity of minutes and other Communist Party documents which he had collected during his membership, together with a memorandum he prepared interpreting them (R. 2253-55; 2257). On his direct examination as a witness for the Attorney General, Gitlow identified these documents and "explained" their contents. Petitioner's motion for production of the memorandum was denied (R. 2763-64, 2257-58, 128).

After the remand by this Court, petitioner renewed its motion for the production of the memorandum, which the Board again denied (R. 2191, 2225). A majority of the

court below, Judge Bazelon dissenting, affirmed this ruling in its second decision (R. 2763-71, 2787). It held, citing *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 225-26, that although the Board had erred in denying petitioner's production motions, the error could not be corrected upon review of the Board's order, and that petitioner's exclusive remedy was a motion for leave to adduce the memorandum as additional evidence pursuant to section 14(a) of the Act.

In accord with this ruling, petitioner promptly moved under section 14(a) of the Act for leave to adduce the Gitlow memorandum as additional evidence (R. 2797). As the motion pointed out: (1) The court's earlier denial of a motion by petitioner under section 14(a), which sought review of the Board's refusal to order production of impeaching documentary evidence relating to another witness, had led petitioner to believe that the court did not consider such a motion available for that purpose. (2) The court had recognized that its ruling was a novel extension of the *Consolidated Edison* rule, and petitioner could not, therefore, have reasonably anticipated it. (3) Since the court had remanded the proceeding for other reasons, allowance of the motion would not materially delay ultimate disposition of the case (R. 2798-2801).

The court denied petitioner's motion (R. 2820), stating (R. 2821), "We adhere to the views expressed in our opinion promulgated January 9, 1958." But those views, as we have seen, were that petitioner was entitled to get the Gitlow memorandum by such a motion. Petitioner called this paradox to the attention of the court in its brief following the second remand (pp. 14-15) and asked for reconsideration of the earlier ruling. In its opinion of July 30, 1959, the court adhered to its position, but this time on the ground that "a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter" (R. 2838).

The *Consolidated Edison* case, *supra*, on which the court below relied in holding that petitioner had mistaken its remedy, at most holds that an administrative exclusion of testimony can be reviewed only by a motion for leave to adduce additional evidence under standard statutory review provisions like those contained in section 14(a) of the Act.[48] The court below extended this rule to apply to an administrative refusal to order the production of statements for use in impeaching a witness on cross-examination. Moreover, as the court below recognized (R. 2769), its decision conflicts with the holding of the Eighth Circuit in *Mississippi Valley Structural Steel Co.* v. *N.L.R.B.*, 145 F. 2d 664, that the rule may be satisfied by assigning the exclusionary ruling as error in a petition for review. Furthermore, as the court below realized (R. 2769), its decision will hamper the efficient administration of justice by necessitating multiple interlocutory appeals to review exclusionary rulings of administrative agencies operating under statutes containing standard review provisions.

For these reasons, the decision below presents questions of general importance concerning the review of administrative rulings. Moreover, under the circumstances of this case, the denial of petitioner's motion for leave to adduce the Gitlow memorandum as additional evidence violated accepted standards of fair play.

B. Budenz' Statements to the FBI

As we have seen (*supra*, p. 65), the Attorney General first disclosed the existence of disc recordings of Budenz' 1945 interview with the FBI after petitioner had petitioned for a rehearing following the decision below of January 9, 1958. Petitioner then moved under section 14(a) for the production of so much of the recordings and of FBI

[48] The case involved the refusal of the Labor Board to hear testimony tendered by an employer contrary to an agreement restricting the number of witnesses it would call.

memoranda of subsequent interviews with Budenz as related to the subject matter of his testimony (R. 2797, 2814). The court below, Judge Bazelon dissenting, denied the motion except insofar as it related to statements of Budenz concerning the Starobin letter and the Weiner conversation. The court held that petitioner was not entitled to statements concerning other matters on which Budenz had testified because it had not moved for their production at the original hearing and because the blanket demand made in its 14(a) motion was "a fishing expedition" and untimely (R. 2820-22, 2831).

The court below was wrong on all three counts.

(1) At the original hearing, the Board denied petitioner's motions for prior statements relating to the Starobin and Weiner matters (R. 1184-85, 2277-78, 128). These rulings were based on the erroneous premise, adopted by the Board in denying petitioner's motion for the Gitlow memorandum,[49] that prior statements to the FBI were producible only upon a showing that they were inconsistent with the testimony of the witness (R. 2255-57, 128; Tr. 2886).[50] Obviously petitioner was not required to make futile motions for prior statements of Budenz on other subjects, once the Board had established a principle which required their denial.

(2) Petitioner's motion under section 14(a) for all prior statements relating to the subject matter of Budenz' testimony was not a "fishing expedition," but conforms to the procedure specified in 18 U. S. C. 3500.

---

[49] Gitlow was the first witness called by the Attorney General (R. 216).

[50] Bowing to this ruling, petitioner confined its subsequent production motions to situations in which, as it contended, such a showing had been made. It was on this ground that it moved for Budenz' statements on the Starobin and Weiner matters (R. 1184-85; 2275; Tr. 14076-80).

(3) As Judge Bazelon found (R. 2832), and as the record discloses (R. 2815-18), Budenz' testimony at the original hearing, the action of the Board in cutting off cross-examination, and representations made by the Board to the court below, had misled petitioner into believing that there were no verbatim transcriptions of FBI interviews with Budenz. Since petitioner moved for the relevant portions of the transcriptions as soon as it learned of their existence its motion was not untimely.

If upon review the Court holds that all of Budenz' testimony should have been stricken (see *supra*, pp. 63-68), the question now under discussion will, of course, drop out of the case. However, since the question is important and may be reached, a grant of certiorari should be broad enough to include it.[51]

C. Statements to the FBI by Other Witnesses for the Attorney General

In its decision of January 9, 1958, the court below held (R. 2777-78) that the principles of *Jencks* v. *United States*, 353 U. S. 657, and 18 U. S. C. 3500 were applicable to the proceeding before the Board. Accordingly, after the case had been remanded to the Board by the court below, petitioner moved for the production of all statements, as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General at the original Board hearing and which related to the subject matter of their testimony (R. 2338). After the Board denied the motion (R. 2346-47), petitioner sought production of the statements

---

[51] Budenz' unavailability at the time of the last Board hearing does not moot the question. He may have recovered sufficiently to take the stand by the time the case gets back to the Board. If not, the Board, consistently with its ruling on the Weiner and Starobin matters, would be required to strike Budenz' testimony on all subjects to which the prior statements relate.

by a motion in the court below for leave to adduce them as additional evidence pursuant to section 14(a) (R. 2833).[52]

The court below denied the motion, stating (R. 2839), "The motion comes too late, and in any event it is not supported by any authority," and that the *Jencks* case disapproved "fishing expeditions." These are the same grounds on which the court refused to order production of the Budenz statements and which, as we have shown, are fallacious. The question presented by the denial of petitioner's motion for the relevant FBI statements of all of the Attorney General's witnesses should therefore be reviewed.

VII. The action of the court below in sustaining the order of the Board after striking a key finding conflicts with decisions of this Court.

One of the eight criteria of a Communist-action organization under section 13(e) is the organization's use of secret practices "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives." The Board, in its original Report, found that petitioner engages in secret practices for both of the stated purposes (R. 117). In the first decision below, the court struck the purpose findings as not supported by the evidence (R. 2151). This holding made the subsection inapplicable. Nevertheless, the court affirmed the order of the Board.

The Modified Report, issued by the Board after the first remand, eliminated the original finding that one of the purposes of the secret practices was concealment of foreign control (R. 2585 ftn.). However, it retained the other purpose finding stricken by the court below, namely, that the secret practices were engaged in for the purpose of

[52] Petitioner's brief in the court below also assigned the Board's ruling as error.

promoting petitioner's objectives (R. 2598). The court below in its latest opinion adhered to its former ruling that this purpose finding was unsupported by the evidence (R. 2837). Nevertheless the court affirmed the Board's order.

The importance of the secrecy finding is clear. It relates to one of the eight standards of section 13(e). The Board devoted to it a fifteen-page subsection of the Modified Report (R. 2584-98). It is also the only one of the 13(e) standards on which the Board was able to cite evidence more current than 1940. The importance attached to the subject by the Board further appears from its retention of the finding even after the court below held it unsupported by the evidence.

The decision below thus affirmed the order of the Board while setting aside one of the major bases for the Board's action. This violated an important principle of administrative law established by the decisions of this Court. The function of a reviewing court is to determine whether the administrative findings are adequately supported by the evidence and whether the administrative order is supported by the findings. Once the court decides that the order rests in part on an unsupported finding, it must remand the case for administrative redetermination without considering whether the order could be sustained on other grounds. *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Colorado Wyoming Gas Co.* v. *F.P.C.*, 324 U. S. 626, 634; *F.P.C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

The court below justified its action on the ground that "the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court" (R. 2837). Obviously, this eliminates the *Chenery* rule. The decision below, therefore, departs from a basic principle governing judicial review of administrative action.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

JOHN J. ABT,
320 Broadway,
New York, N. Y.,

JOSEPH FORER,
711 14th St. N. W.,
Washington, D. C.
Attorneys for Petitioner.